24662

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 235.

JOHN GLAVEY, APPELLANT,

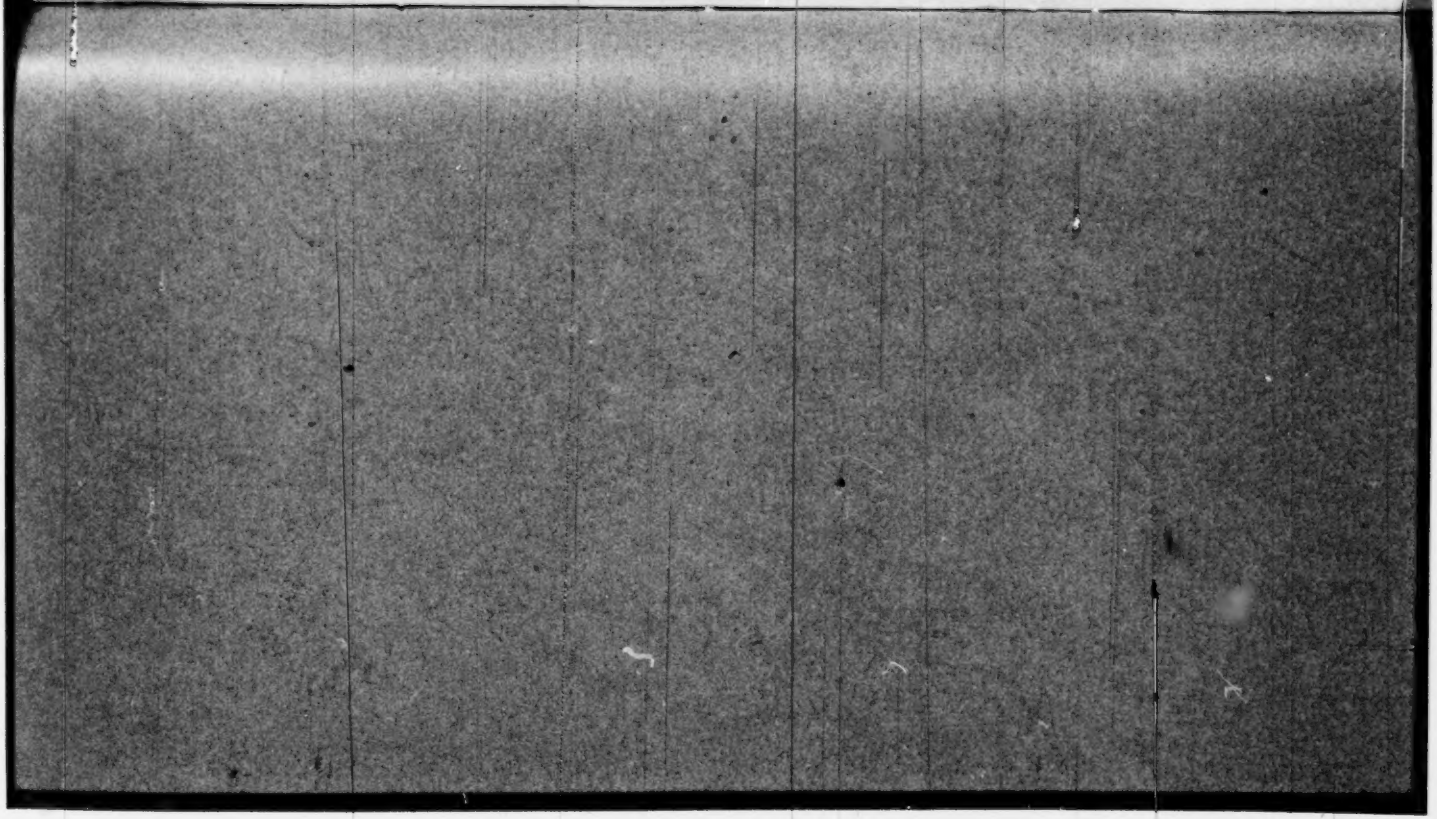
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 29, 1900.

(17,695.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1900.

1 Court of Claims.

JOHN GLAVEY
vs.
THE UNITED STATES. } No. 20790.

I.—*Petition. Filed May 22, 1897.*

To the honorable justices of the United States Court of Claims:

John Glavey, the plaintiff herein, respectfully represents:

First. That he is a citizen of the United States, of lawful age, and resident at No. 3331 Dauphin street, New Orleans, Louisiana.

Second. That on the seventh (7) day of August, 1882, an act of Congress entitled "An act to amend section 4400, of title fifty-two, of the Revised Statutes of the United States, concerning the regulation of steam vessels," was duly approved and became a law, which act, under section 2, provided that "the Secretary of the Treasury shall appoint officers, to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of Baltimore two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two."

Under sections 3, 4, and 5, the official duties of such inspectors were defined, and section 6 provided "that the salaries of the special inspectors of foreign steam vessels and clerks provided for, together with their travelling and other expenses when on official duty, * * * shall be paid for by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated;" which said act continued in force until it was repealed by act of Congress approved March 1, 1895.

Third. That on the 15th day of May, A. D. 1891, the petitioner was appointed by the Secretary of the Treasury, under the provisions of the statute heretofore cited, approved August 7, 1882, a special inspector of foreign steam vessels for the port of New Orleans, Louisiana, "the appointment to take effect from the date of oath."

Fourth. That the petitioner took the oath of office on or about the 25th day of May, 1891, and entered immediately upon the discharge of the duties of the office of special inspector of foreign steam vessels at the port of New Orleans, and continued in the office and to discharge the duties of said office until the 27th day of May, A. D. 1894.

Fifth. That while the petitioner was duly appointed by the Secretary of the Treasury, under the act heretofore cited, approved August 7th, 1882, and performed the duties of a special inspector of foreign steam vessels from the 25th day of May, 1891, to the 27th day of May, 1894, a period of three years and two (2) days, he did

2 not receive from the Secretary of the Treasury or any other officer or agent of the United States, or from the United States, the salary of two thousand dollars ($2,000) per annum

as provided in the act of Congress approved August 7th, 1882, for special inspector of foreign steam vessels for the said service from the 25th day of May, 1891, to the 27th day of May, 1894, nor for any part of that time, nor any part of the two thousand dollars ($2,000) affixed by act of Congress to the office, and which the act of August 7th, 1882, says "shall be paid for by the Secretary of the Treasury, out of any moneys in the Treasury not otherwise appropriated."

Sixth. That the petitioner has demanded of the Secretary of the Treasury of the United States the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98), as payment of salary as special inspector of foreign steam vessels, at the rate of two thousand dollars ($2,000) per annum, from May 25th, 1891, to May 27th, 1894, being three years and two days, and was refused.

Wherefore the plaintiff claims from the United States the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98) and prays:

Prayers.

First. That judgment be entered against the United States for the claimant for the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98) and the costs of this suit, and that process issue therefor.

Second. For such other and further relief as, the premises considered, may be equitable and just.

JOHN GLAVEY, *Claimant.*

E. S. MUSSEY,
Solicitor for Plaintiff.

STATE OF LOUISIANA,
City of New Orleans, County of New Orleans, } ss:

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; and that the facts therein stated upon personal knowledge are true, and those stated upon information and belief I believe to be true; and that the sum herein claimed is justly due from the defendant, exclusive of all set-offs and just grounds of defence.

JNO. GLAVEY.

Subscribed and sworn to before me this fourth day of May, A. D. 1897.

[SEAL.] J. V. GUILLIOTT, *Not. Pub.*

In the United States Court of Claims.

JOHN GLAVEY
v.
THE UNITED STATES. } No. 20790.

Affidavit of John Glavey.

CITY AND COUNTY OF NEW ORLEANS, LOUISIANA, *ss:*

John Glavey, being duly sworn, deposes and says that he is the claimant in the above-entitled cause, the sole owner of the claim, and the only person interested therein, and has made no assignment or transfer of said claim or any part thereof.

JOHN GLAVEY.

Subscribed and sworn to before me this twenty-eighth day of May, A. D. 1897.

[SEAL.] J. V. GUILLIOTT, *Not. Pub.*

Filed June 3, 1897.

3 II.—*Traverse. Filed June* 12, 1897.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha- not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOSHUA E. DODGE,
Assistant Attorney General.

4 III.—*Findings of Fact and Conclusions of Law.*

JOHN GLAVEY
v.
THE UNITED STATES. }

This case having been heard by the Court of Claims, the court, upon the evidence, make the following

Findings of Fact.

I.

The claimant, a citizen of the United States, residing at New Orleans, La., was, on the 17th day of April, 1891, duly appointed, pursuant to Revised Statutes, section 4415, to the office of local inspector

of hulls of steam vessels, for the district of New Orleans, La., and on April 21, 1891, he accepted said appointment and duly qualified by taking the prescribed oath of office and by forwarding the same together with the official bond prescribed by law therefor to the Treasury Department. He then and there entered upon the discharge of his duties and continued to discharge the same until May 27, 1894.

During the claimant's incumbency of said office he claimed each month the salary thereof by rendering his accounts therefor, which were promptly paid by the defendants.

II.

The report of the supervising inspector general for the fiscal year ending June 30, 1889, recommended:

"That sections 2 to 6, inclusive, of the amendment to section 4400, Revised Statutes, which provides a separate set of officers and clerks for the inspection of foreign steam vessels be repealed, the reasons for the creation of such offices having ceased to exist upon the passage of the act approved June 19, 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers, which fees were permanently appropriated previously for the support of the domestic inspection service and which could not legally be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support. The action of Congress in the matter of creating the separate offices was based on the reasons given in the following extract from the special report of the supervising inspector general, dated January 21, 1882:

"'* * * * Authority should be given the Secretary of the Treasury to appoint these special inspectors and to pay their salaries, * * * per annum, and necessary traveling expenses, from funds appropriated from moneys in the Treasury not otherwise appropriated, as it would seem obviously improper that such special officers should be paid from the appropriation for the salaries and expenses of steamboat inspection from funds collected by a tax on American steamboat owners and the licensed officers of such vessels.'

"As the officers and clerks of both services are now paid from funds in the general Treasury, the advantage of uniting the two services must be clearly obvious, both as to public interests and economy in conducting the service.

"In the latter respect a saving can be made of all the salaries now being paid, except at the port of New York, where two of the officers and the clerk might be retained by transfer to the domestic service, dispensing with the services of the other two now employed. The inspectors at San Francisco, Boston, Philadelphia, Baltimore, and New Orleans could be dispensed with altogether, thereby saving to the Government the sum of $14,000 annually, the total of salaries now paid those officers. The additional work that would fall upon the domestic service by such dispensation would be as follows:

	Steamers.		Steamers.
At New York	138	At Buffalo	8
At San Francisco	11	At Oswego	22
At Boston	18	At Burlington, Vt.	3
At Portland, Me.	7	At Detroit	2
At Philadelphia	8	At New Orleans	16
At Baltimore	10		
At Port Huron	3	Total	257
At Marquette	11		

"JAS. A. DUMONT,
"*Supervising Inspector General.*"

III.

By the finance report of the Secretary of the Treasury to the Speaker of the House of Representatives, first session Fifty-first Congress (1889), it was recommended "that all laws be repealed which provide a separate establishment for the inspection of foreign steam vessels, and that the inspectors of domestic steam vessels be authorized and required to perform all necessary services in connection with the inspection of foreign steamships. The offices proposed for abolition are virtually sinecures, and until they are abolished the Executive will remain subjected to importunity to fill them. The services of three of these officers have been dispensed with."

The three officers disposed of were those at San Francisco, Cal.; New Orleans, La., and Philadelphia, Pa.

IV.

While the claimant was holding the office, aforesaid, to wit, May 25, 1891, he received from the Secretary of the Treasury a communication, of which the following is a true copy, viz:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, Louisiana.

"SIR: Under the provisions of an act of Congress, approved August 7th, 1882, entitled 'An act to amend section 4400 of title
6 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath.

"Respectfully yours,
(Signed) "CHARLES FOSTER, *Secretary.*"

V.

May 25, 1891, the claimant took the oath therein referred to, which was in the usual form of an oath of office, and transmitted

the same to the Secretary of the Treasury on that date. He was not required to and did not give or offer to give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath aforesaid until May 27, 1894, the claimant performed the duties of a special inspector of foreign steam vessels at said port.

VI.

During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels for which he was paid as aforesaid make to the Secretary of the Treasury or to any other officer of the Government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.

VII.

Prior to the time the claimant ceased to perform the services aforesaid, he received from the acting Secretary of the Treasury a communication of which the following is a true copy:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *December* 15, 1893.

"Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La.

"SIR: Department letter of the 7th instant requesting you to tender your resignation as inspector of hulls of steam vessels for the tenth district is hereby revoked, and you are requested to tender your resignation as inspector of hulls of steam vessels for the district of New Orleans, La., also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor.

"Respectfully yours, W. E. CURTIS,
"*Acting Secretary.*"

7 Thereafter he received from the acting Secretary another communication, of which the following is a copy:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *April* 14, 1894.

"Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La.

"SIR: Your services as inspector of hulls of steam vessels for the

district of New Orleans, La., are hereby discontinued, to take effect upon the appointment and qualification of your successor."

"Respectfully yours, S. WIKE,
"*Acting Secretary.*"

(Took effect Monday, May 28, 1894.)

And, thereafter, May 28, 1894, the claimant's duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office after which the claimant ceased to perform the duties of said office. The claimant performed the duties of said office as special inspector of foreign steam vessels until said May 26, 1894, a period of three years and two days.

Conclusion of Law.

Upon the foregoing findings of fact, the court decide, as a conclusion of law, that the claimant's petition be dismissed.

BY THE COURT.

8 IV.—*Opinion of the Court and Dissenting Opinion.*

HOWRY, J., delivered the opinion of the court:

This is an action to recover salary amounting to $6,010.90, which, under the act of August 7, 1882 (22 Stat. L., 346), was provided for the payment of a special inspector of foreign steam vessels. The time for which salary is claimed covers three years and two days.

While the claimant was holding the office and performing the duties of local inspector of hulls of steam vessels at the port of New Orleans, and receiving the salary thereof, $2,250 per annum, the Secretary of the Treasury sent the claimant a letter, as follows:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, La.

"SIR: Under the provisions of an act of Congress approved August 7, 1882, entitled 'An act to amend section 4400 of title 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, La., the appointment to take effect from date of oath.

"Respectfully yours,
CHARLES FOSTER, *Secretary.*"

The claimant took the oath as directed and entered upon the discharge of the duties pertaining to the office. He was not required to nor did he give the official bond provided for by section 4 of the act nor did he offer to give bond. He served as such special in-

spector of foreign steam vessels from May 25, 1891, to May 27, 1894, a period of over three years, during which time he made no demand upon the Secretary of the Treasury or any other officer of the Government for the salary or other compensation for such service; nor did he during that period make any protest or objection to the Secretary of the Treasury or to any other officer of the Government concerning the performance of the service as such special inspector in connection with his appointment as local inspector without additional compensation.

December 15, 1893, the acting Secretary of the Treasury, as set forth in the findings, requested the claimant to tender his resignation as "inspector of hulls of steam vessels for the district of Louisiana, also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor;" and thereafter, May 28, 1894, his duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office, after which the claimant also ceased to perform the duties of special inspector of foreign steam vessels.

The claimant proceeds upon the theory that by that act of the Secretary of the Treasury he was duly appointed to the office of special inspector of foreign steam vessels, and that having taken the oath in the usual form and entered upon and discharged the duties pertaining to the office, he is entitled to the salary provided therefor by section 2 of the act, notwithstanding the conditions stated in the letter of the Secretary, and notwithstanding, also, that he was not required to nor did he give the official bond provided for as aforesaid.

Whether the claimant's right to receive the salary sued for be measured by the terms of the letter of the Secretary of the Treasury or by his conduct in assuming to act, in connection with his other duties, as a special inspector of foreign steam vessels without additional compensation, in either event it does not seem proper to hold that this claim has any merit.

The official annual report of the supervising inspector general for the fiscal year ending June 30, 1889, contained a recommendation that sections 2 to 6, inclusive, of the amendment to section 4400, Revised Statutes, which provided a separate set of officers and clerks for the inspection of foreign steam vessels, be repealed, because the reasons for the creation of such offices had ceased to exist after the passage of the act of June 19, 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers. These fees were permanently appropriated previous to that time for the support of the domestic inspection service and could not lawfully be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support.

9 The supervising inspector general is an officer of the Treasury, and his report to the Secretary became a part of the official archives relating to the business of the department. By that report it was further made to appear that a saving could be

made of all salaries paid inspectors of foreign steam vessels (except as to the port of New York) by uniting these with those of local inspectors of hulls of steam vessels. It is true that the recommendation of the Secretary of the Treasury for the repeal of the law suggested by the report of his subordinate was not immediately acted upon by Congress, but the fact remains that at certain ports, including New Orleans, the duty of inspectors of foreign steam vessels had practically ceased. Thus, for the fiscal year ending June 30, 1890, the services of special inspectors of foreign steam vessels at the ports where no necessity existed for regular appointments were discontinued and local inspectors were assigned to inspect the foreign vessels without extra pay. An incumbent at New Orleans by regular appointment under the amendment to section 4400 of the Revised Statutes was removed during that fiscal year because the duties were nominal.

In that part of his finance report to Congress relating to the foreign inspection service, Secretary Windom, in 1889, expressly stated that the offices involved in the inspection of foreign steam vessels were virtually sinecures, and that the services of three of these officers had been dispensed with. (Rep. Sec. Tr., 1st sess. 51st Cong.) One of these officers so discontinued was the incumbent at New Orleans, as above stated. Congress was slow in repealing the law, but sanctioned the steps taken by the Secretary in the interest of public economy as far as silence and acquiescence in his action could go. In this condition of affairs Secretary Foster made the request of the claimant out of which this controversy has arisen.

In the transaction of the business of the Government judicial notice can be taken of the official reports and acts of the executive departments unless for reasons of public interest and policy secrecy is maintained as to them by the heads of departments. With knowledge of the facts which these reports and acts of the Treasury Department afford to us, the question then arises whether in the matter before us the Secretary of the Treasury had the power to devolve the duties of special inspectors of foreign steam vessels without additional compensation upon local inspectors of hulls of steam vessels at the ports of entry where the necessity for regular separate officers no longer existed.

That the Secretary had no power to compel the local inspectors to serve without extra compensation is a matter not necessary to discuss, because no such attempt was made. Compulsory service does not enter into the case at all. And it may even be conceded for the purposes of the argument that the incumbent of any one office cannot be required to perform duties, however slight, belonging to another office without the corresponding right to claim whatever salary there may be attached to the second office. But it is not uncommon in the business of executive administration for the incumbent of an office to be requested to discharge the duties of another office in connection with the duties of his own. Nor is it uncommon for these dual duties to be performed without any thought of claiming or supposed right to claim the salary attached to both. Instances are not wanting—in fact, they are

numerous—where in the exigencies of the public service double duties are assigned to particular officials (above the grade of clerks) without the corresponding right on the part of the official thus assigned to claim compensation for the second office. There is nothing dangerous in this practice, since an official may ordinarily decline to take upon himself the obligations and duties of an office different from his own without some agreement or understanding for additional compensation. This claimant undertook to specially discharge new duties temporarily without any expectation of a new commission. He complied with the Secretary's request, and accepted the special service upon the terms requested. The request was unattended by anything indicating duress, and was merely the equivalent of a detail to service. It was a conditional appointment, and therefore no such appointment as conferred title to the office. Claimant looked upon it in this light by not giving the bond which the statute imposed, or even offering to give it, at any time during the period of his service. The Secretary had no power under the law to dispense with a bond. His failure to prescribe the conditions of a bond establishes the belief that he never intended to make complete claimant's appointment to the office for which salary is now claimed. The oath taken by claimant was merely the incident to the discharge of the duties, and could not in itself make him a *de jure* officer. As an officer *de facto* he can claim nothing for himself. (The People *v.* Weber, 89 Ill., 348.) The decisions are uniform that one claiming a salary must prove his legal title to the office and that an officer *de facto* cannot maintain an action for salary. (Romero *v.* The United States, 24 C. Cls. R., 336; see also Dorsey *v.* Smyth, 28 Cal., 25; Stratton *v.* Oulten, 28 Cal., 51; Morton *v.* Tiernan, 30 Barb., 193; Bennett's case, 19 C. Cls. R., 358.)

It is a matter of no consequence in determining the rights of the claimant what action, if any, the Secretary of the Treasury would have taken for the inspection of steam vessels had claimant not rendered the special service. Whether the Secretary would have omitted to have a few vessels inspected at so high a price by neglecting to fill the offices, or would have hastened the repeal of the law giving such large salaries for services which time had made so insignificant by urging the matter upon the attention of Congress more persistently, we do not certainly know. It is reasonable, however, to suppose that measures in the interest of an economical administration of the affairs of the department would have been taken but for the conduct of the claimant. In any event local inspectors of hulls of steam vessels would probably not have been invited to the feast of a second office having such inconsiderable duties while enjoying the emoluments of those offices which they already held.

If this were a transaction between individuals it could not stand the test which the claimant seeks to have applied in his behalf. His silence operated as a fraud in fact. Had he informed the Secretary that he could not accept the special service indicated upon the terms placed before him by the Secretary's letter, other means,

doubtless, would have been used to obviate the needless expense involved in a regular appointment. But claimant made no protest, gave out no intimation that he expected compensation, led the Secretary to believe that the conditions imposed by the letter assigning him to duty had been accepted, thus misleading his superior officer for a period of several years. The claim, then, is the result of a studied silence apparently, by means of which claimant seems to have thought he might thereafter more successfully claim for a longer period of salary. In this view what else can such a fraud in fact be considered unless it be deemed a fraud in law? If it was an afterthought, there can be no recovery under the well-settled principle of law that if a person renders a service without
11 intent to charge for the same and this is so understood by the other party, no recovery can be had for such services. (Goode *v.* United States, 25 C. Cls. R., 267.) If there was a reserved intention on the part of the claimant to claim the salary, he is upon every principle of law and equity estopped from the assertion of the demand. Acquiescence and waiver are always questions of fact. (Pence *v.* Langdon, 99 U. S. R., 578–581.) The cases where acquiescence and waiver operate in analogy to estoppel are too numerous to cite. Mr. Justice Shiras declares the rule aptly expressed (citing 2 Pom. Eq. Jur., par. 965), as follows:

"When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all the material facts freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations." (Simmons *v.* Burlington, etc., Railway Company, 159 U. S. R., 291.)

That the Government can, in proper cases, invoke the doctrine of acquiescence and waiver is too plain to argue. That it can do so on a claim for salary to an office with insignificant duties undertaken and performed by another officer detailed to their temporary discharge under the facts here is equally clear. Salary is not such a sacred thing that a person should be permitted to impose upon his Government under the circumstances shown here in order to obtain its payment. Estoppel had no application in People *ex rel.* Satterlee *v.* Board of Police (75 N. Y., 38), because in that case there was no question of the full and complete regularity of the appoint-

ment and of the performance of every undiminished duty under it, and the court held that an agreement to take less than the salary fixed by law did not establish a binding contract. Both elements appearing in that case are wanting here—the appointment of the claimant having conditions which rendered it a mere detail to service incident to analogous duties then being performed by him on the ground at the time in another office, and the service under the detail being nominal and perfunctory.

The proposition that under a provision of the act of May 1, 1884 (23 Stat. L., 17), claimant could not accept voluntary service for the Government is not applicable, because that act relates to employees in the Indian Office. Claimant could not render voluntary service and now be heard to say he is entitled to pay for service so rendered in his own violation of the law, even if that act related to other branches of the public service.

The petition is dismissed.

12 *Dissenting Opinion.*

PEELLE, J., dissents:

The claimant in this action seeks to recover the salary of special inspector of foreign steam vessels provided for by the act August 7, 82 (22 Stat. L., 346), under the following appointment:

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, Louisiana.

"SIR: Under the provisions of an act of Congress approved August 7th, 1882, entitled 'An act to amend section 4100 of title 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath.

"Respectfully yours,

"CHARLES FOSTER, *Secretary.*"

On the part of the defendants it is contended (1) that the claimant was not appointed to the office; (2) that if appointed, he never qualified by giving bond, and was not, therefore, an officer *de jure*, and (3) that if appointed he is estopped from receiving the salary by reason of his silent acquiescence in the action of the Secretary, and by making no demand therefor during his period of service.

It is manifest from the language of the letter that what the Secretary intended was, that inasmuch as the claimant was then holding the office of local inspector of hulls of steam vessels, for which he was being paid the salary of $2,250 per annum, he could, in connection with the duties of that office, also perform, without additional compensation, the duties of special inspector of foreign steam vessels.

The language in the letter of the Secretary, "the appointment to take effect from date of oath," may fairly be considered as a direction to the claimant to take the oath prescribed by law before entering upon the discharge of the duties of the office to which he had been appointed; though if he had omitted that language, such oath, under Revised Statutes, section 1756, would have been an essential prerequisite to his performance of the duties of the office.

The Secretary of the Treasury had no authority to require of the claimant the performance of the duties pertaining to the office of inspector of foreign steam vessels, except pursuant to the statute requiring the same, section 2 of which reads:

"That for the purpose of carrying into effect the provisions of this act the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers, at the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two."

13 It will thus be seen "that for the purpose of carrying into effect the provisions of the act, the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels" * * * "at a salary of $2,000 per annum," two of which were to be appointed at the port of New Orleans. They were not to be appointed at the discretion of the Secretary, nor was he to be the judge even as to the number to be appointed. The services were to be performed as provided in section 3, "under such regulations as shall be prescribed by the Secretary of the Treasury," but manifestly that did not clothe him with authority to annul the statute, or to provide that the services therein provided for might be performed by some one by assignment or designation, or by some qualified appointment without compensation.

And although the Supervising Inspector General, in his report to the Secretary of the Treasury, recommended the repeal of the law as set forth in finding 2, and the Secretary so recommended to the Congress, still the law was not repealed until March 1, 1895 (28 Stat. L., 699).

The Secretary of the Treasury had but two alternatives—either to appoint to office, upon the terms of the statute, if there were duties to be performed, or to leave the office vacant if there were none.

By the urgent deficiency appropriation act of May 1, 1895 (23 Stat. L., 15, 17), under the head of "Indian Office," it is provided: * * * "and hereafter no department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property."

That language, though seemingly applicable only to the Indian service, is quite broad enough to apply to the heads of the several executive departments; but whether so or not, the law but

emphasizes the principle that where the law provides for the doing of certain things by means of officers to be appointed, and the compensation is fixed therefor, that becomes the rule by which the appointing power and the officer appointed is to be guided.

The salary attached to a public office belongs to the incumbent, not by force of any contract, but because the law attaches it to the office (Fitzsimmons *v.* Brooklyn, 102 N. Y., 536).

Even assuming that the Secretary might have refrained, in the interest of public economy, from exercising his authority of appointment under the act, notwithstanding the seeming mandatory provision of the statute, still he did not do that; and it is clear from his letter that he intended to clothe the claimant with authority to perform the duties of the office. The only way he could do that was in the manner set forth in the statute, and in his letter he cites the act—authority—under which he appointed the claimant and advised him that the appointment would take effect from the date of oath.

The claimant would not have been permitted, after assuming the duties of the office, to have disputed the validity of his appointment as a justification or defense in a criminal prosecution.

It is plain, therefore, that the Secretary intended to and did appoint the claimant as special inspector of foreign steam vessels, which appointment took effect from the date of subscribing the oath.

The defendants contend, however, that because the claimant did not give the bond provided for in section 4 of the act under
14 which he was appointed that therefore his tenure was that of a *de facto* and not a *de jure* officer, and for that reason he had no legal title to the salary of the office. Some authorities are cited in support of the contention stated, among which are the cases of Williams (23 C. Cls. R., pp. 46, 53). Converse, of United States (21 How., 463); Hall *v.* Wisconsin (103 U. S., 5).

In the Williams case the claimant was appointed minister resident and consul general of the United States to Hayti, and his commission therefor was signed and was in the hands of the State Department, where the claimant had taken the oath of office, but by the provision of the Revised Statutes, section 1697, he was inhibited from receiving his commission or entering upon the discharge of the duties of his office until he had given a bond, and hence by his failure to give such bond he was not entitled to his commission, and the court held that he was not therefore entitled to the emoluments of the office.

The defendants also cite the case of The United States *v.* Delaney (164 U. S. R., 282), affirming the decision of this court (31 C. Cls. R., 44). But the only question in that case was as to whether the register and receiver of a newly created land office was entitled to compensation from the time he was engaged, under the verbal direction of the Commissioner of the General Land Office, in the necessary preliminary preparation for opening the office for public business, or from the date of such opening only; and the court held that

having previously qualified by taking the oath of office and giving bond, he was entitled to be paid during the period of such preliminary preparations.

In the case of The United States *v.* Eaton (169 U. S. R., 331), affirming the decision of this court (31 C. Cls. R., 158), it was ruled, among other things, that the claimant, who had been appointed vice consul general by the minister resident and consul general at Siam, to perform the duties of the latter during his absence, was entitled to compensation during the time he performed such duties though no bond was given and approved until thereafter.

In that same case the court, at page 346, in speaking of the contention of the Government that under Revised Statutes, section 1698, it was error to allow the claimant compensation before his bond was approved, the court said:

"It is settled that statutory provisions of the character of those referred to are directory and not mandatory."

In the case of United States *v.* Bradley (10 Pet., 343, 365), which was a suit on the bond of a paymaster wherein it was contended that the giving of a bond before entering upon the discharge of his duties was a prerequisite, and not having done so he was not accountable for the moneys that came into his hands, the court, speaking by Mr. Justice Story, said: "The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster he must account for them as paymaster."

And so in the case of United States *v.* Linn (15 Pet., 290, 313), wherein the statute required the claimant, as receiver of public moneys, to execute a bond before entering upon the duties of the office, the court held that "these emoluments were the consideration allowed him for the execution of the duties of the office, and
15 his appointment and commission entitled him to receive this compensation whether he gave any security or not;" and furthermore, in referring to the case of United States *v.* Bradley (*supra*), the court said: "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was made."

In the case of The United States *v.* Flanders (112 U. S. R., 88) a collector of internal revenue was required, before entering upon the duties of his office, to give bond, and before being entitled to the salary was also required to take the oath of office, both of which he failed to do for two months, but in the meantime performed the duties of the office. The court in relation thereto held in substance that while his title to receive the compensation did not arise until he had taken the oath, still when he did so he was entitled thereto from the date he commenced to perform the duties of the office.

In the present case section 4 of the act under which the claimant was appointed provides:

"That each special inspector of foreign steam vessels shall execute a proper bond, to be approved by the Secretary of the Treasury, in

such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office."

It will be observed by that section that the bond was not only to be approved by the Secretary, but that its form and conditions were also to be prescribed by him, so that if none were prescribed by the Secretary the claimant was not in fault in not giving. At all events, his failure to give such bond did not deprive him of any right he might otherwise have had to the compensation of the office.

Therefore when the Secretary in pursuance of the act referred to in his letter said "you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, La., the appointment to take effect from date of oath," he thereby appointed the claimant to the office, and upon taking the oath prescribed by law, as he did, he became fully invested therewith as an officer *de jure*, though no bond was required or given, and consequently he was entitled to the emoluments thereof unless his acceptance of the appointment without protest and without making any demand for such compensation during his continuance in office operates as a waiver or an estoppel.

It is undoubtedly settled law that where an office is created and the salary fixed by law that "the appointing power has no control beyond the limits of the statutes over the compensation, either to increase or diminish it." Adams' case (20 C. Cls. R., 115, 117), and many other cases there cited to the same effect.

The vital question is, Does the doctrine of waiver or estoppel apply in cases of this kind?

The claimant by accepting the office and performing the duties thereof without protest and without making any demand for compensation during his continuance in office may in fact have led the Secretary to believe that the conditions he sought to impose in his letter of appointment had been accepted by him.

16 But manifestly the Secretary of the Treasury had no right to impose such conditions, and in doing so he exceeded his authority, even though he acted from motives of public economy. Hence the claimant's silence must be considered only in reference to the conditions sought to be imposed by the Secretary, for manifestly had no such conditions been incorporated in the letter of appointment his failure to demand the salary of the office during his term of service could not be urged as a waiver or as an estoppel.

When the Congress have enacted a law providing for the doing of certain things by means of officers to be appointed therefor at fixed salaries, that becomes the only rule by which such services are to be performed. The question of public economy in respect thereof has been settled by the law, and by that the officer who performs such service is entitled to have his rights measured.

The statute under which the claimant was appointed fixed the salary of his office at $2,000 per annum, and that he was entitled to, notwithstanding the salary he received as local inspector, as the two offices were not incompatible and they were distinct, each having its own duties and compensation defined by statute. (United States *v.*

Saunders, 120 U. S. R., 126, 129.) Hence the defendants could not have been misled to their injury by the claimant's silence in respect of the compensation to which he was entitled by law, and over which the appointing power had no control. (United States *v.* McLean, 95 U. S. R., 750.)

In the interest of the public service the weight of authority undoubtedly is against the validity of waiving and, perhaps, of pledging official compensation to accrue for services to be rendered, or to satisfy the same by a less amount even though a receipt be given therefor in full. (Fisher's case, 15 C. Cls. R., 323.)

If that be true, can it be held that the claimant by his silence waived his right to that which was due him by law, and about which no one had any authority to deprive him of even by contract? He accepted the office and qualified by taking the oath. He performed the service and the defendants received the benefits thereof.

In the case of Railroad Company *v.* Dubois (12 Wall., 47, 64), it was said "No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt."

In the Alvord case (8 C. Cls. R., 364, 369) the authorities on the question of estoppel by the silence of a party are set out quite fully, the substance of which is that no one is permitted to keep silent when in conscience he ought to speak, and if he does so to the hurt of another, he shall be debarred from speaking in defense when conscience requires him to keep silent.

The defendants cannot be said to have been misled to their injury by reason of the failure of the claimant to say that he would not accept the office and perform the duties thereof without additional compensation, for the law under which he was appointed, and under which the Secretary acted, also fixed the compensation, and that the claimant was bound to know could not be increased or diminished by the appointing power.

The Secretary having no authority to increase or diminish the salary, he of course had none to take it away altogether, and therefore when he appointed the claimant as special inspector to serve without compensation he exceeded his authority, and the claimant was not bound to speak, especially when by declining to serve without compensation his resignation of the office of local inspector might have been called for and the compensation of that office lost to him. In this respect the Secretary and the claimant were not on equal terms. (Swift Company *v.* United States, 111 U. S. R., 22, 28; Robertson *v.* Frank Bros. Co., 132 U. S., 17, 23.)

The Secretary's letter of appointment should not be construed as an order assigning to duty a man who was not an inspector in law or in fact to examine the vessels of private owners and subject them to the "visitation" and penalties prescribed by the Revised Statutes, sections 4407, 4418, 4421, 4423, and 4424.

The claimant grounds his right to recover on the statute, a law of the Congress, and our duty is simply to give effect to that statute by

the application of the facts, and this we have endeavored to do, and in our view of the case the claimant should recover.

Nott, Ch. J., concurred in the opinion of Peelle, J.

17 V.—*Judgment of the Court.*

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

At a Court of Claims held in the city of Washington on the 12th day of March, A. D. 1900, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimant, John Glavey, be dismissed.

BY THE COURT.

18 VI.—*Application for and Allowance of Appeal.*

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

To the honorable justices of the Court of Claims:

Now comes the petitioner herein, by his attorney, Mrs. Ellen S. Mussey, and moves the court for leave to appeal to the Supreme Court of the United States from the decision of your court dismissing the petition herein.

E. S. MUSSEY,
Attorney for Petitioner.

Filed March 22, 1900.

MARCH 22, 1900.

The foregoing application for appeal having been presented by the attorney for the claimant in open court, it was ordered that the same be allowed as prayed for.

BY THE COURT.

19 Court of Claims.

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29 day of March, A. D. 1900.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,695. Court of Claims. Term No., 235. John Glavey, appellant, *vs.* The United States. Filed March 29th, 1900.